IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEAN CARPENTER, Plaintiff, v. BMW OF NORTH AMERICA, INC., Defendant.	:	Civil Action No. 99-CV-214

MEMORANDUM

R.F. KELLY, J. JUNE 21, 1999

Before this Court is Plaintiff's Motion for Class Certification. Plaintiff has brought claims against Defendant BMW of North America, Inc. ("BMW") based on Consumer Fraud Statutes, fraud, negligent misrepresentation and breach of contract. Plaintiff alleges that BMW has engaged in a scheme to defraud purchasers through written misrepresentations regarding certain 1999 BMW 3 and 5 series models. More specifically, Plaintiff alleges that BMW has marketed the GM five-speed automatic transmissions in these models as a BMW product, since the introduction of the vehicles into the market place on or about July 1, 1998. For the following reasons, Plaintiff's Motion for Class Certification will be denied.

I. STANDARD FOR CLASS CERTIFICATION

"To obtain class certification, plaintiffs must satisfy all of the requirements of Rule 23(a) and come within one

provision of Rule 23(b)." Georgine v. Amchem Products, Inc., 83 F.3d 610, 624 (3d Cir. 1996), aff'd, 521 U.S. 591 (1997). Rule 23(a) requires plaintiffs to establish (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. FED. R. CIV. P. 23(a). More specifically, Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

In addition to satisfying 23(a) requirements, a putative class must satisfy one part of subsection 23(b). In the instant action, Plaintiff seeks certification pursuant to 23(b)(3), which requires that (1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and that (2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

II. COMMONALITY AND PREDOMINANCE

As stated above, class certification requires that there be questions of law or fact common to the class and that such common questions predominate over any questions affecting

only individual members.[1] Georgine, 83 F.3d at 626. Here, the limited common issues identified by Plaintiff cannot satisfy the predominance requirement in this case.

The parties agree that to determine each class member's legal rights, this Court will have to apply the law of each of the 50 states.[2] Def.'s Brief at 16; Plf.'s Brief at 24-25.

> [W]here the applicable law derives from the law of the 50 states, as opposed to a unitary federal cause of action, differences in state law will "compound the [] disparities" among class members from the different states. Thus, . . . certification of a nationwide class in which the law of the 50 states, rather than federal law, must be identified and applied, places the burden upon plaintiffs to "credibly demonstrate, through an `extensive analysis' of state law variances, `that class certification does not present insuperable obstacles.'"
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> That common issues must be shown to "predominate" does not mean that individual

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[1] "Rule 23(a)(2) does not require that all questions of law or fact that are raised be common to the entire class." Truckway, Inc. v. General Electric, Civ. A. No. 91-0122, 1992 WL 70575, *3 (E.D. Pa. March 30, 1992). Indeed, the actual language of the rule suggests that there simply be at least more than one question of law or fact. Id. Because in this case there are factual and legal issues common to the proposed plaintiff class as to whether BMW deceived consumers regarding the maker of the transmissions of the subject automobiles, the commonality element is satisfied.

[2] "[E]xistence of state law variations is not alone sufficient to preclude class certification." Chin v. Chrysler Corp., 182 F.R.D. 448, 458 (D.N.J. 1998), (citing In re School Asbestos Litig., 789 F.2d 996, 1011 (3d Cir.), cert. denied, 479 U.S. 852 (1986), and In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 815 (3d Cir.), cert. denied, 516 U.S. 824 (1995)).

> issues need be non-existent. All class members need not be identically situated upon all issues so long as their claims are not in conflict with each other. The individual differences, however, must be of lesser overall significance and they must be manageable in a single class action . . . .

Chin v. Chrysler Corp., 182 F.R.D. 448, 453 (D.N.J. 1998) (citations omitted).

In an effort to meet her burden of providing an "extensive analysis" of state law variations, Plaintiff has submitted a series of charts and affidavits (Plf.'s Exhs. "K" through "R") utilized in In re Prudential Ins. Co. America Sales Litigation, 148 F.3d 283 (3d Cir. 1998), cert. denied, 119 S. Ct. 890 (1999), setting forth an analysis of the various state laws applicable to the legal claims of common law fraud, breach of contract, negligent misrepresentation, consumer fraud and punitive damages, at issue in the instant action. Plaintiff emphasizes that the Prudential plan was adopted by the Third Circuit Court of Appeals and, thus, should be adopted by this Court.[3]

However, as the court observed in In re Jackson Nat'l

[3] The fact that the Third Circuit Court of Appeals affirmed the district court's approval of the plan submitted in Prudential does not ensure adoption of the same plan in this or any other case by Plaintiff merely submitting the same charts and exhibits used by the plaintiff in Prudential. Cf. Tylka v. Gerber Products Co., 178 F.R.D. 493, 498 n.3 (N.D. Ill. 1998) ("Plaintiffs should not expect the court to ferret through, disseminate, and craft manageable schemes from these exhibits when that burden clearly rests with Plaintiffs.").

Life Ins. Co. Premium Litigation, 183 F.R.D. 217 (W.D. Mich. 1998), Prudential is distinguishable both factually and procedurally:

> Prudential is distinguishable not only factually -- by virtue of the uniformity of alleged misrepresentations, which simplified fact issues . . ., but also procedurally inasmuch as the Prudential class was certified for settlement purposes only. The Third Circuit observed in affirming the Prudential class certification that when a district court is confronted with a request for settlement-only class certification, it "need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." 148 F.3d at 316 n.57, quoting Amchem, 117 S. Ct. at 2248. See also Chin, 182 F.R.D. at 458; Ford Vehicle Paint, 182 F.R.D. at 225-26; Ford Ignition Switch, 174 F.R.D. at 350. Here in contrast, plaintiffs seek nationwide class certification of multiple state law claims of some 300,000 class members involving various factual premises for trial. **Manageability is therefore a very real concern.**

Id. at 224 (emphasis added). The same can be said for the case at hand.[4] Here, "[t]he numerous state law variations implicated by certification of a nationwide class . . . militate against a finding that a class action is the superior method for adjudication of the controversy." Id. at 223; see also Castano

[4] For example, as BMW correctly points out, see Def.'s Brief at 24-28, the state laws vary significantly with regard to elements such as burden of proof, knowledge, and duty to disclose which are necessary to establish plaintiff's fraud-based claim. See, e.g., In re Ford Motor Company Vehicle Paint Litigation, 182 F.R.D. 214, 223 (E.D. La. 1998).

v. American Tobacco Co., 84 F.3d 734, 745 n.19 (5th Cir. 1996) ("the greater the number of individual issues, the less likely superiority can be established."); In re American Medical Systems, Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action.").

In addition, Defendant argues that "proof of individual reliance, which cannot be presumed, overwhelms any common issues." Def.'s Brief at 18. Plaintiff counters by arguing that the fraud claim in this case stems from misleading omissions which does allow for reliance to be presumed. Plf.'s Brief at 26-27 (citing Prudential, 148 F.3d at 314). However, the cases supporting the proposition that reliance may be presumed are federal securities fraud cases. See In re Ford Motor Co. Bronco II Product Liab. Litig., 177 F.R.D. 360, 374 (E.D. La. 1997).

Here, the claims at issue involve state law fraud claims, not federal securities fraud claims.[5] Under such circumstances,

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[5] The presumptive reliance theory upon which Plaintiff relies "has generally been limited to the securities market where the courts can presume `a nearly perfect market in information.'" Maguire v. Sandy Mac., Inc., 138 F.R.D. 444, 451 (D.N.J. 1991); Ford Bronco II, 177 F.R.D. at 374 (same); see also Jackson, 183 F.R.D. at 222 ("The Prudential presumption was premised on the existence of uniform and material misrepresentations."). In this case, where Plaintiffs have alleged that BMW has misrepresented the origin of its 3 and 5 series' transmissions through written

district courts have generally held that proof of reliance is required. See, e.g., Ford Vehicle Paint, 182 F.R.D. at 221; Jackson Nat'l Life Ins., 183 F.R.D. at 222; In re Ford Motor Co. Ignition Switch Products Liability Litigation, 174 F.R.D. 332, 346 (D.N.J. 1997); Ford Bronco II, 177 F.R.D. at 374; Truckway, Inc. v. General Electric, Civ. A. No. 91-0122, 1992 WL 70575, *5-6 (E.D. Pa. March 30, 1992); Rosenstein v. CPC Int'l, Inc., Civ. A. No. 90-4970, 1991 WL 1783, *4-5 (E.D. Pa. Jan. 8, 1991); Strain v. Nutri/Systems, Inc., Civ. A. No. 90-2772, 1990 WL 209325, *7 (E.D. Pa. Dec. 12, 1990).

BMW also asserts that claims under each of the 50 states' consumer protection statutes are overwhelmed by individual issues.[6] BMW of North America, Inc., v. Gore, 517 U.S. 559, 568-69 (1996) ("No one doubts that a state may protect its citizens by prohibiting deceptive trade practices . . . .

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promotional and marketing materials, it would be illogical to presume reliance where the effect, if any, of various marketing materials on each class member's purchase will have to be analyzed. See Buford v. H & R Block, Inc., 168 F.R.D. 340, 360-61 (S.D. Ga. 1996).

[6] With respect to the Pennsylvania Act, BMW correctly contends that an individual inquiry will be required to determine which Pennsylvania purchasers: 1) use the automobile "primarily for personal, family or household purposes;" 2) read any of the complained of promotional materials; 3) interpreted those promotional materials in the manner suggested by plaintiffs; 4) relied upon that interpretation of those representations as a basis in purchasing their BMW automobile; and 5) would have purchased a different automobile or would have purchased the same car only for a lesser amount. Def.'s Brief at 29-30.

But the states need not, and in fact do not, provide such protection in a uniform manner."); Tylka, 178 F.R.D. at 498 ("[A] brief review of the [consumer fraud] statutes reveals not only nuances, but differing standards of proof, procedure, substance, and remedies."). Plaintiff, in response, argues that all of the Consumer Protection Laws around the United States were created to protect consumers from deceptive conduct and can be grouped into 3 categories -- (1) those prohibiting any "unfair or deceptive act or practice, either with no further specificity or with an included but not limited to list of specific practices that are prohibited, (2) those limiting claims to a "laundry list" of more specifically defined practices, with a number these remaining quite broad, and (3) those states that adopted either the first or second group, but have added a scienter requirement. Plaintiff concludes, based on her division into the above groups, that the consumer fraud laws "can easily be divided into subclasses and cha[r]ged to the jury." Plf.'s Brief at 36. Such a proffer, however, is "overly simplistic." Tylka, 178 F.R.D. at 498 (finding that plaintiffs failed to meet their burden and demonstrate that the nuances of 50 consumer fraud statutes and 50 common laws are manageable).

As for Plaintiff's contract claims, BMW points out that individual issues arise in each case regarding privity

requirements[7] and whether BMW promotional statements were an "affirmation of fact." Def.'s Brief at pp. 36-37. BMW further contends that multiple factual issues exist as to whether class members had read or should have been aware of any of the public disclosures of the source of the five-speed automatic transmisson, whether each class member read, or should have read or been aware of the information furnished to each purchaser on the Monroney Label[8], and whether any statement was, or was not considered by each purchaser to be merely opinion or puffery. Def.'s Brief at 37. Plaintiff, on the other hand, contends that the only determination relevant to this Court would be whether BMW failed to deliver a "BMW" product, "since all class members clearly entered into a contract to purchase their cars." Plf.'s Surreply at 16. In doing so, Plaintiff fails to address why resolution of the Plaintiff's breach of contract claims will not require this Court to examine the facts and circumstances of each individual case to determine whether a representation made by BMW concerning the origin of the five-speed automatic transmissions

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[7] See, e.g., Ford Ignition Switch, 174 F.R.D. at 346 (recognizing that the need for plaintiffs in a proposed class action to prove contractual privity will require the court to undertake an inquiry that will turn on the facts particular to each individual plaintiff).

[8] The "Monroney Label" on Plaintiff's 1999 BMW 328ia four-door sedan stated that the five-speed automatic transmission was sourced in "France," the engine was sourced in "Germany" and the car was assembled in "Munich, Germany." Def.'s Ex. 10.

in the subject automobiles formed a "basis of the bargain." Cf. Mack v. GMAC, 169 F.R.D. 671, 678 (M.D. Ala. 1996) ("The same problems which plague the plaintiff's fraud claims also plague the plaintiff's inducement of breach of contract and inducement of fiduciary duty claims."); Jackson Nat'l Life Ins., 183 F.R.D. at 222 ("[A] showing of plaintiffs' reliance is essential also to their breach of contract claim."). The problem of sorting out these individual issues at trial weighs against granting class certification.

Furthermore, it will be difficult to formulate any measure of damages for representative plaintiff, let alone a uniform measure for a nationwide class because of the state law variations that exist with regard to 1) calculation of diminution in value, 2) limitation of incidental and consequential damages in contract actions, and 3) the Consumer Protection Acts' methodologies used to calculate actual damages as well as variations in the 21 states that provide for minimum statutory damages, treatment of punitive and treble damages and the requisite level of culpability required, and the availability of attorney fees.

For example, Plaintiff's claimed damages for her fraud and contract claims will be for alleged diminution in the value of the product, her "loss of the premium price paid . . . for a BMW deigned and manufactured automobile . . . ." Plf.'s Exh. A

at ¶¶ 40 and 50. In Chin, the court noted that "the value of [a] vehicle[] is dependent on a whole host of individualized factors including age, mileage, repair and maintenance history and accidents or damage." Chin, 182 F.R.D. at 463. That different state law formulations for considering the above factors may result in some plaintiffs not being entitled to any compensatory damages weighs against a finding that a class action is the superior method of adjudication and that common issues of fact and law predominate. Id.

Plaintiff also seeks to compel BMW to offer rescission to the class members, an equitable remedy that is only available under specific limited factual circumstances. Chin, 182 F.R.D. at 463 ("The approriateness of rescission would be determined under the applicable laws of the 52 jurisdictions."). Such wide variation of state laws regarding the types of damages to which class members are entitled provides another basis for class certification to be denied.

III. THE PROPOSED CLASS ACTION LACKS SUPERIORITY

Rule 23(b)'s second requirement calls for the demonstration by class representatives that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Ford Ignition Switch, 174 F.R.D. at 351; Chin, 182 F.R.D. at 462. Both predominance and superiority must be satisfied by the putative class represenative

in order for class certification to be granted. This Court concludes that even if Plaintiff could have satisfied the predominance requirement, the instant class certification motion would fail nonetheless on the basis of the superiority requirement.

It is generally desirable to litigate similar, related claims in one forum, especially where, as here, the recovery being sought by each of the plaintiffs is not sufficiently large to render individualized litigation a realistic possibility. The attractiveness of this proposition begins to fade, however, as the intricacies of a trial on a class-wide basis are considered. As demonstrated below, Plaintiff cannot overcome numerous factual and legal issues and offer a workable plan to take advantage of the economies of class treatment. Cf. Chin, 182 F.R.D. at 462-63.

For example, BMW argues that with the variations in state law it would be next to impossible to instruct a jury on the relevant law. Def.'s Brief at 47 (citing American Medical Systems, 75 F.3d at 1085)). While BMW admits that state law variations alone may not be sufficient to preclude class certification, BMW points out Plaintiff's failure to provide a "trial blueprint to this Court to make the action manageable." Id. at 47-48; see also Chin, 182 F.R.D. at 458. In this regard, BMW criticizes Plaintiff for not submitting any sample jury

instructions or jury verdict forms as was done in Prudential and other cases. In a surreply, Plaintiff attempts to justify this failure with the explanation that because Plaintiff specifically adopted the plan approved by the Third Circuit Court of Appeals, and Judge Wolin, in Prudential, there apparently was no need to submit proposed jury instructions and verdict forms, "the realities of the situation [being] that this case will most likely never go to trial if Plaintiffs are successful in achieving national class certification." Plf.'s Surreply at 16. Plaintiff follows this remarkable explanation with a sketchy proposal for managing the plethora of managability problems.[9]

First, Plaintiff suggests having 51 subclasses, i.e., a subclass for each jurisdiction, with no plan as to how the jury could meaningfully be instructed on the laws of each jurisdiction with respect to plaintiff's multiple claims, each of which contains numerous elements, multiplied by thousands of class members. Id. Next, Plaintiff proposes only three subclasses for the Consumer Fraud Count, despite the numerous individual issues

[9] It is well-settled that "a district court must first find a class satisfies the requirements of Rule 23, regardless [of] whether it certifies the class for trial or for settlement." Prudential, 148 F.3d at 308. While Plaintiff highlights this principle when discussing the Third Circuit's adoption of the plaintiffs' class certification plan in Prudential, see Plf.'s Surreply at 14, by neglecting to submit a feasible trial blueprint, Plaintiff has curiously dismissed the need to seriously treat this litigation as if it could proceed to trial and be manageable in class form.

presented by the variations in state statutes. Similarly, Plaintiff disregards the state law variances that will need to be addressed to prove a breach of contract, having boldly stated that no subclasses are needed. As for negligent misrepresentation, BMW correctly charges that Plaintiff has apparently ignored her own Exhibit N, indicating that the elements needed to establish negligent misrepresentation will vary among the 50 states, with some states not even recognizing such a claim. And Plaintiff's assertions that only three sub-classes will be necessary to cover all of the state law variations regarding Plaintiff's fraud and punitive damage claims is not supported by Exhibits M and O to Plaintiff's Brief.[10]

Plaintiff's proposed jury interrogatories are likewise inadequate. The 11 questions drafted by Plaintiff merely scratch the surface of a mountain of difficult issues that a class action trial of this magnitude would present. As BMW puts it:

> Although plaintiff admits that even under her proposal there are numbers of subclasses required, she submits only one set of jury interrogatories. Thus, even under plaintiff's proposal, the 11 questions are insufficient. Plaintiff makes no attempt to set forth jury interrogatories for each of its proposed sub-classes nor does she attempt to delineate which jury interrogatories

[10] The Supreme Court of the United States has recognized that "states necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." BMW v. Gore, 517 U.S. 559, 568 (1996).

> account for the variances admitted by plaintiff in the various causes of action.

Def.'s Supp. Mem. at 10. Thus, while Plaintiff has presented to this Court an analysis of the laws of each of the 50 states for each of their causes of action, Plaintiff fails to meet her burden of setting forth a workable plan for dealing with the problems a trial would present.[11]

In a similar case, a Louisiana federal court, in considering the superiority of the class action mechanism, anaylzed the public policy justifications for the use of class actions. Ford Bronco II, 177 F.R.D. at 375. Having already noted extensive manageability problems in that case resulting from the need to determine and apply the law of 50 jurisdictions and in trying to isolate common issues from individualized issues, the court further determined:

> [T]he meager nature of individualized recovery is but one factor considered under the superiority analysis. Two other important factors that inform the analysis are the effect certification will have on the defendant (e.g., will it create undue pressure to settle?) and the effect certification will have on judicial resources (e.g., is the cause of action immature in the sense that there is no real track record of resolution of similar claims, and will it create manageability problems?).
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> In connection with the judicial

[11] It is worth noting that "no federal court has attempted to try a case under the laws of every state." Chin, 182 F.R.D. at 461.

> efficiency/manageability factor, the Fifth Circuit in Castano noted not only that the case presented an immature tort and would benefit from some individual state court litigation, but also that the difficulty of the choice of law issue alone may justify refusal to certify the class. The Castano court observed that the complexity of the choice of law inquiry "makes individual trials a more attractive alternative and, **ipso facto, renders class treatment not superior**."

Id. at 375-76 (adding emphasis). As already discussed above, similar manageability problems are present in the instant action.

IV. NUMEROSITY AND TYPICALITY

BMW further objects to class certification based on numerosity and typicality requirements. At this point in time, Plaintiff has merely alleged that "upon information and belief, the proposed class consists of tens of thousands of Plaintiffs who have purchased the Subject Automobiles since their introduction into the marketplace on or around July 1, 1998." Plf.'s Mem. at 10. Plaintiff notes that "[t]he documents produced by BMW pursuant to Plaintiffs' discovery will confirm this allegation." Id. at n.3. While Plaintiff is not required to fix a precise number, Plaintiff must show some evidence of the existence of the numbers of persons for whom she speaks. Mere speculation is insufficient. To the contrary, "[a] higher level of proof than mere common sense impression or extrapolation from cursory allegatons is required." Schwartz v. Upper Deck Co., 183 F.R.D. 672, 681 (S.D. Cal. 1999). Thus, Plaintiff's failure to

present any evidence to back up her allegation that the proposed class is so "numerous" that joinder of all members is impracticable provides further grounds for Plaintiff's Motion for Class Certification to be denied.

In addition, "Rule 23(a) requires that the claims or defenses of the class representative be typical of the entire class." Truckway, 1992 WL 70575 at *3. The Third Circuit has described the typicality requirement as follows:

> The typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees. The inquiry assesses whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented.

Georgine, 83 F.3d at 631.

Here, BMW argues that Mr. and Mrs. Carpenter's joint purchase of their vehicle based on their own unique tastes, knowledge, experience and interaction with various dealership personnel make this case atypical. Def.'s Brief at 53. In its responsive brief, BMW also complains that Plaintiff's definition of the class is improper and overly broad because she also seeks to proceed on behalf of all purchasers of the 1999 BMW 528 ia model automobile, which is not presently equipped with a five-speed automatic transmission as alleged by Plaintiff. According to BMW, this overly expansive definition of the proposed class

presents specific typicality problems in that purchasers of the 5 series vehicles based their purchase on separate advertisements and promotions.

However, "[t]he Third Circuit has observed that `typical' does not mean `identical'." Strain, 1990 WL 209325 at *4 (citing Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1984)). Rather, "the court must focus on whether the plaintiffs' individual circumstances are markedly different or whether the legal theory upon which the claims are based differs from that upon which the claims of the other class members will be based." Id. Here, Plaintiff alleges she has been injured as a result of BMW's scheme to deceive consumers by selling, promoting, and marketing the Subject Automobiles as having automatic transmissions that were manufactured and designed by BMW, when they actually contained transmissions manufactured and designed by General Motors. Accordingly, Plaintiff's claims are representative of the other class members and, thus, satisfy "the relatively loose typicality threshold test as enunciated in Falcon v. General Telephone, 457 U.S. 147, 161 (1982), by the showing of a sufficient interrelationship between the claims of the representative and those of the class." Id. (citations omitted). Yet, satisfaction of the typicality requirement is not

enough to justify granting the instant motion.[12]

Because Plaintiff has not met her burden of establishing that the proposed class meets all of Rule 23's requirements, Plaintiff's Motion for Class Certification will be denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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[12] Rule 23's adequacy of representation requirement "tests the qualifications of the counsel to represent the class" and "serves to uncover conflicts of interest between named parties and the class they seek to represent." Prudential, 148 F.3d at 312 (citations omitted). BMW does not dispute that counsel for Plaintiff is competent and experienced in complex class action litigation. Thus, this final factor does not stand in the way of class certification.

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ORDER

AND NOW, this 21st day of June, 1999, upon consideration of Plaintiff's Motion for Class Certification and Defendant's Response thereto, it is hereby ORDERED that said motion is DENIED.

BY THE COURT:

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Robert F. Kelly, J.